

FEDERAL CIRCUIT COURT OF AUSTRALIA

NGUYEN v MINISTER FOR IMMIGRATION & ANOR [2017] FCCA 3138

Catchwords:

MIGRATION – Application for judicial review of decision of Administrative Appeals Tribunal (**Tribunal**) affirming decision not to grant Partner (Provisional) (Class UF) visa – whether Tribunal mischaracterised evidence – whether by mischaracterising any evidence the Tribunal evinced misunderstanding of the tasks it was required to perform – whether the Tribunal failed to consider evidence it was required to consider – no jurisdictional error.

Legislation:

Migration Act 1958 (Cth), ss.5F(1), 5F(2), 5F(3)

Migration Regulations 1994 (Cth), regs.1.15A(2), 1.15A(3)(c)(ii), Schedule 2, cl.309.211(2)

Cases cited:

Fang Wang v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 1044

Applicant:	THI THAO NGUYEN
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 2663 of 2015
Judgment of:	Judge Manousaridis
Hearing date:	28 November 2016
Date of Last Submission:	28 November 2016
Delivered at:	Sydney
Delivered on:	20 December 2017

REPRESENTATION

Counsel for the Applicant:	Mr L Karp
Solicitors for the Applicant:	Vietaust Lawyers
Counsel for the First Respondent:	Mr M Cleary
Solicitors for the First Respondent:	Mills Oakley Lawyers

ORDERS

- (1) The application is dismissed.
- (2)
- (3)
- (4)
- (i)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 2663 of 2015

THI THAO NGUYEN

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This application for judicial review raises two points. The first is whether, in concluding it was not satisfied that the applicant and the visa applicant, Mr Cung, were not in a “*married relationship*” within the meaning of s.5F of the *Migration Act 1958* (Cth) (**Act**), the second respondent (**Tribunal**) mischaracterised or misunderstood evidence that was before it, thus indicating it misunderstood the statutory task it was required to carry out. The second is whether the Tribunal failed to consider evidence it was required to consider by reg.1.15A(3)(c)(ii) of the *Migration Regulations 1994* (Cth) (**Regulations**).

2. Background

3. On 7 February 2014 Mr Cung applied for a Partner (Provisional) (Class UF) visa (**Partner visa**). He claimed to be the husband of the applicant, who is an Australian citizen.
4. To have been entitled to the grant of a Partner visa, Mr Cung had to satisfy the first respondent (**Minister**), among other things, that he was the “*spouse*” of the applicant.¹ Subsection 5F(1) of the Act provides that a person is a “*spouse*” of another person if, under s.5F(2) of the Act, the two persons are in a “*married relationship*”. Subsection 5F(2) of the Act provides that persons are in a “*married relationship*” if:
 - a) (a) *they are married to each other under a marriage that is valid for the purposes of this Act; and*
 - b) (b) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - c) (c) *the relationship between them is genuine and continuing; and*
 - d) (d) *they:*
 - e) (i) *live together; or*
 - f) (ii) *do not live separately and apart on a permanent basis.*
5. Subsection 5F(3) of the Act provides that the Regulations “*may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist*”. Under reg.1.15A(2) of the Regulations the Minister, when considering an application for a Partner visa, must “*consider all of the circumstances of the relationship, including the matters set out in subregulation (3)*”. The matters set out in reg.1.15A(3) of the Regulations are the financial aspects of the relationship, the nature of the household, the social aspects of the relationship, and the nature of the persons’ commitment to each other. The social aspects of the relationship include “*the opinion of the persons’ friends and acquaintances about the nature of the relationship*”.²

¹ Clause 309.211(2) of Schedule 2 to *Migration Regulations 1994* (Cth)

²*Migration Regulations 1994* (Cth) reg.1.15A(3)(c)(ii)

6. Mr Cung supported his application for a Partner visa with a number of statements. One was a statement he made in which he said the following:³
- a) Mr Cung first met the applicant in April 2009 when he came to Australia to visit his aunt and his cousins. He and the applicant *“happily talked to each other”* and he *“felt easily when talking to her”* because they had come from the same area in Vietnam, and both the applicant and Mr Cung had been divorced and had children from their previous marriages. The applicant visited Mr Cung’s aunt’s house, and sometimes Mr Cung and the applicant *“went around Sydney or went out for dinner”*. Mr Cung’s aunt advised him to take a further step in the relationship with the applicant, but Mr Cung told his aunt he and the applicant *“would need more time to understand each other”*.
 - b) After he returned to Vietnam in July 2009 Mr Cung and the applicant occasionally talked to each other by phone using prepaid sim cards *“as it was cheap”*. Mr Cung and the applicant talked *“once every month at most”*. Mr Cung considered the applicant a friend because Mr Cung *“was not still ready for a new relationship”*.
 - c) In 2013 Mr Cung’s cousins were on holiday in Vietnam. After Mr Cung informed his cousins that he and the applicant were only friends, Mr Cung’s cousins *“wanted to officially match-make us”*. Because Mr Cung’s and the applicant’s families urged them to marry, Mr Cung and the applicant contacted each other more regularly.
 - d) On 10 July 2013 Mr Cung called the applicant and disclosed his feelings for her and proposed marriage. The applicant accepted. The applicant travelled to Vietnam. Two days after the applicant arrived she and Mr Cung went to the Australian embassy *“for the marriage registering procedure”*. Mr Cung and the applicant were *“officially married on 27 September 2013”* and the wedding reception was held on 9 October 2013.⁴

³ CB92-94

⁴ CB93-94, [9], [10]

7. The applicant herself provided two statements which repeated the substance of what Mr Cung said in his statement.⁵ The applicant and Mr Cung also relied on statements from the applicant's father, Mr Van Hue Nguyen,⁶ Mr Cung's aunt, Ms Thi Ty Nguyen,⁷ the applicant's sister, Ms Thi Hoi Nguyen,⁸ Mr Cung's father, Mr Van Hoc Cung,⁹ and four other persons - Ms Thi Ha Nguyen¹⁰, Ms Thi Lien Nguyen¹¹, Ms Thi Thanh Pham¹², and Thi Mai Nguyen¹³.
8. The applicant's father, Mr Van Hue Nguyen, made two statements, one on 22 January 2014,¹⁴ and one on 12 August 2015.¹⁵
- a) In his statement of 22 January 2014 Mr Van Hue Nguyen stated he knows Mr Cung through Mr Cung's aunt who is a close friend. Mr Van Hue Nguyen stated he believed the relationship between the applicant and Mr Cung "*is genuine and continuing*", that they love and care for each other, that since they have been a couple they have always been happy and "*share each other every aspects [sic]*".¹⁶
- b) In his statement of 12 August 2015 Mr Van Hue Nguyen said he knows Mr Cung through Mr Cung's aunt, having first met him in 2009 when Mr Cung visited his aunt in Australia. After he met Mr Cung in 2009 at a barbecue held at Mr Cung's aunt's house, Mr Van Hue Nguyen formed a favourable opinion of Mr Cung and, after finding out more about him, he thought Mr Cung and the applicant would be "*compatible together*". After Mr Van Hue Nguyen attempted to persuade her to do so the applicant agreed to give herself and Mr Cung a chance to get to know each other. Mr Van Hue Nguyen noticed the applicant becoming more cheerful and optimistic. In the beginning of 2013 Mr Van Hue Nguyen had a "*serious conversation*" with the

⁵ CB89-91; CB303-305

⁶ CB102-104; CB289-290

⁷ CB108-110; CB286-287

⁸ CB99-101

⁹ CB96-98

¹⁰ CB293-295

¹¹ CB296-297

¹² CB111-113

¹³ CB105-107

¹⁴ CB102-104

¹⁵ CB289-291

¹⁶ CB102

applicant about her relationship with Mr Cung during which the applicant said she feared her relationship with Mr Cung “*will be broken again.*” After reassuring her that as long as the applicant and Mr Cung had feelings for each other Mr Van Hue Nguyen would “*help them*” so he contacted Mr Cung’s aunt to “*discuss the matter*”. Mr Cung’s aunt agreed to talk to Mr Cung to find out if he had feelings for the applicant so “*they can pursue further with the relationship*”.

9. Mr Cung’s aunt, Ms Thi Ty Nguyen, made two statements, one on 22 January 2014,¹⁷ and the other on 12 August 2015.¹⁸

- a) In her 22 January 2014 statement, Mr Cung’s aunt stated she is a close friend of the applicant’s parents, and it is through them that she knows the applicant. She also stated that she believed that the relationship between Mr Cung and the applicant is “*genuine and continuing*”; that Mr Cung and the applicant are compatible and a “*happy couple*”; and that their marriage will be long-lasting.
- b) In her statement of 12 August 2015 Mr Cung’s aunt said: the applicant often complained to her about how lonely she was; Mr Cung’s aunt decided to introduce the applicant to Mr Cung; Mr Cung first met the applicant at the aunt’s house in 2009 during a barbecue party; the aunt believed the applicant and Mr Cung “*got along really well and that their friendship progressed*”; that based on conversations with the applicant and Mr Cung she believed they had “*developed feelings for each other*”; the applicant’s father had contacted her to tell her he wanted the applicant and Mr Cung “*to proceed further with their relationship*”; she encouraged the applicant and Mr Cung to pursue their relationship further, but Mr Cung said that, although he had feelings for the applicant, he was afraid of another broken relationship.

10. Ms Thi Ha Nguyen said the following:¹⁹

¹⁷ CB108-110

¹⁸ CB286-287

¹⁹ CB293-294

- a) Ms Thi Ha Nguyen has known the applicant since the time she lived in Vietnam and maintained contact with the applicant since arriving in Australia.
- b) The applicant and Ms Thi Ha Nguyen are close friends, and the applicant tells Ms Thi Ha Nguyen everything. Ms Thi Ha Nguyen knows a lot about the applicant's previous relationship and also knows how lonely the applicant felt after her relationship with her former husband had broken down.
- c) Ms Thi Ha Nguyen encouraged the applicant to date but the applicant told her she was not ready to enter into a relationship because she feared it would fail like her previous relationship.
- d) The applicant informed Ms Thi Ha Nguyen how she met Mr Cung and how she feels attracted to him, and Ms Thi Ha Nguyen encouraged her to pursue a relationship with Mr Cung because she believes Mr Cung would be a "*reliable husband*" for the applicant and "*a respectable father*" to the applicant's children.
- e) Ms Thi Ha Nguyen says she knows the applicant and Mr Cung contacted each other after Mr Cung returned to Vietnam and that the applicant has feelings for Mr Cung; and that Ms Thi Ha Nguyen encouraged the applicant to take further steps with Mr Cung because the applicant was "*more cheerful than before*" and the applicant often talked to her about Mr Cung.
- f) Ms Thi Ha Nguyen knows that the relationship between Mr Cung and the applicant is "*genuine and continuing*", that they care for each other very much, that from Ms Thi Ha Nguyen's conversations with the applicant, Ms Thi Ha Nguyen knows the applicant and Mr Cung "*phone each other and talk to their children regularly*", and that, ever since she married Mr Cung, the applicant is more relaxed and not as stressed as before.

11. Ms Thi Lien Nguyen said the following in her statement:²⁰

- a) Ms Thi Lien Nguyen has known the applicant since 1990 when the applicant first arrived in Australia. She and the applicant

²⁰ CB296-297

have attended the same church, and see each other almost every week.

- b) Ms Thi Lien Nguyen and the applicant “*share many things together*”. From the applicant Ms Thi Lien Nguyen knows about the applicant’s previous broken relationship, how the applicant struggled to raise her children, how depressed and stressed the applicant was after her relationship with her former husband failed, how she struggled after being released from prison, and how lonely she felt.
- c) Ms Thi Lien Nguyen encouraged the applicant “*to look after her own happiness*”, but the applicant said that her children were young, she wanted to be with them, and she fears “*her new relationship would end up like her previous broken relationship*”.
- d) Ms Thi Lien Nguyen knows that in 2009 the applicant met Mr Cung and was often in contact with him when he returned to Vietnam. Knowing that Mr Cung is a good person Ms Thi Lien Nguyen encouraged the applicant to get to know Mr Cung and “*proceed further with the relationship*”.
- e) Finally, in the beginning of 2013, through the applicant’s family’s and friends’ encouragement, the relationship between the applicant and Mr Cung proceeded further. Ms Thi Lien Nguyen could see that ever since the applicant “*proceeded further*” with Mr Cung “*she became happier than before and was less stressed*”.
- f) After Mr Cung’s application for a Partner visa was refused Ms Thi Lien Nguyen could see the applicant was under stress and upset.

12. Ms Thi Thanh Pham said the following in her statement:²¹

- a) She has known the applicant since she was in Vietnam because she lived near the applicant’s house.

²¹ CB111-113

- b) When she came to Australia, Ms Thi Thanh Pham “*lived in the same as [sic] [the applicant] in Marrickville, and we have often gone to church or visited each other on the weekends*”.
 - c) Ms Thi Thanh Pham attended the wedding of the applicant and Mr Cung in Vietnam.
 - d) Ms Thi Thanh Pham believes the relationship between Mr Cung and the applicant “*as husband and wife is genuine and continuing*”, that the applicant and Mr Cung care for each other very much, and that she “*can see their love for each other*” and so she is “*confident that their marriage will be long lasting*”.
13. Ms Thi Mai Nguyen said the following in her statement:²²
- a) She is the applicant’s sister in law.
 - b) Ms Thi Mai Nguyen knew Mr Cung before the Mr Cung arrived in Australia because they lived in the same area.
 - c) Ms Thi Mai Nguyen “*often visited [Mr Cung] every time I went to Vietnam and brought him gifts from the Sponsor and from his aunt*”.
 - d) Ms Thi Mai Nguyen believes the relationship between the applicant and Mr Cung “*is genuine and continuing*”, they have “*the same situation and are compatible*”, the applicant loves Mr Cung “*very much*” and Mr Cung “*also love [sic]*” the applicant and “*truly care for*” her.
14. The applicant also relied on a statement from Mr Cung’s father, Mr Van Hoc Cung,²³ and the applicant’s sister, Ms Thi Hoi Nguyen).²⁴

a) Tribunal’s reasons

15. The Tribunal first considered the nature of the commitment that each of the applicant and Mr Cung have to each other.

²² CB105

²³ CB96

²⁴ CB99

- a) The Tribunal was not satisfied the applicant and Mr Cung had any significant level of contact from 2009 to the middle of 2013.²⁵
- b) The Tribunal was not satisfied Mr Cung genuinely proposed marriage to the applicant in July 2013. The Tribunal relied on the applicant and Mr Cung having spent only a short time together in 2009; their not having met in person during the following four years;²⁶ and on Mr Cung's phone records which indicated that Mr Cung spoke to the applicant for less than 15 minutes on the day it is claimed he proposed to the applicant, and his not having again contacted the applicant for 11 days.²⁷ The applicant did not provide her phone bill for July 2013, and there was no evidence before the Tribunal of frequent contact in the days following the day on which Mr Cung said he proposed. The Tribunal found that such infrequent contact between Mr Cung and the applicant was inconsistent with Mr Cung making a genuine proposal for marriage, and the applicant accepting it and committing to a shared life with him.²⁸
- c) Although the Tribunal was satisfied the applicant travelled to Vietnam in September 2013, that she and Mr Cung married soon afterwards, that the applicant and Mr Cung spent two weeks travelling after the wedding celebration, that the applicant returned to Australia on 26 October 2013, and that the applicant returned to Vietnam for approximately a week in December 2013, the Tribunal found it was unlikely the applicant and Mr Cung knew each other well enough by that time to have genuinely committed to a shared life.²⁹
- d) The Tribunal found that the applicant's only having briefly visited the applicant in Vietnam to be inconsistent with a significant level of commitment by the applicant to Mr Cung.³⁰

²⁵ CB314, [15]

²⁶ CB314, [16]

²⁷ CB314, [17]

²⁸ CB315, [17]

²⁹ CB315, [18]

³⁰ CB315, [19]

- e) The Tribunal also considered the contact the applicant and Mr Cung had with one another since Mr Cung made the visa application. It found that, while the phone bills are evidence of continuing contact, the applicant and Mr Cung had only been in each other's company for approximately two weeks during the applicant's short trip to Vietnam.
- f) The Tribunal found the "attestations" from "family members (including oral evidence provided by Mr Van Quy Nguyen)" to be "unconvincing evidence of commitment, companionship and or emotional support at the time that Mr Cung applied for the visas" because they were "in similar terms and provide no detail, including whether the writers had observed Mr Cung and [the applicant] together".³¹

16. The Tribunal concluded this part of its reasons as follows:³²

17. The tribunal has found that [the applicant] and Mr Cung did not have a lengthy relationship when he made the visa application. It accepts that they had telephone contact since then but finds that this is not convincing evidence that they provide emotional support or companionship to each other given [the applicant] has not taken the opportunity to spend more time with Mr Cung. In the tribunal's view, this is inconsistent with a mutual commitment to a shared life and there is no convincing evidence to the contrary. In this case, the tribunal finds that the nature of the commitment to each other is not consistent with their being in a married or de facto relationship when Mr Cung applied for the visas.

18. The Tribunal then considered the financial aspects of the relationship. The Tribunal noted the applicant and Mr Cung do not jointly own any assets, have no joint liabilities, and they have not shared day-to-day expenses except when travelling together.³³ The Tribunal also found the applicant's and Mr Cung's plans for their financial future to be vague,

³¹ CB315, [20]

³² CB315, [22]

³³ CB316, [24]. The Tribunal noted this was not surprising given they live in different countries and both have limited incomes.

although the Tribunal also said this did not weigh heavily given that both the applicant and Mr Cung have limited incomes.³⁴

19. After briefly referring to the nature of the household, the Tribunal considered the social aspects of the relationship between the applicant and Mr Cung. The Tribunal began this section of its reasons with the following:³⁵

20. The tribunal referred to statements from family members attesting to a committed relationship between [the applicant] and Mr Cung. As noted, the tribunal does not give those statements great weight and, apart from Mr Van Quy Nguyen's oral evidence and photos, it has no other evidence that friends and acquaintances think of [the applicant] and Mr Cung as a married couple.

21. After concluding it gave little weight to certain photographs that had been produced, the Tribunal referred to a recent psychiatric report from a psychologist whom the applicant had consulted. The Tribunal considered it significant “*the psychologist refers to problems arising from the breakdown of [the applicant's] previous marriage but does not refer to her current marriage to Mr Cung*”.³⁶

22. The Tribunal concluded Mr Cung and the applicant had not mutually committed to a shared life when Mr Cung applied for the Partner visa and Mr Cung and the applicant were not in a genuine and continuing relationship..

23. Ground of application

24. The applicant relies on one ground of application contained in the amended application, which is as follows:

25. The second respondent (the Tribunal) failed to review the decision made by a delegate of the first respondent according to law.

26. Particulars

³⁴ CB316, [26]

³⁵ CB316, [28]

³⁶ CB316, [31]

27. (a) *In considering the social aspects of the applicant's relationship (Migration Regulation 1.15A(3)(c)) the Tribunal failed to lawfully consider the statements of Van Hue Nguyen and Thi Thy Nguyen to the effect that from their observations and conversations, the relationship between the applicant and her husband was genuine.*
28. (b) *Failure to consider the opinions of the applicant's friends and acquaintances, being Thi Thanh Pham, Thi Ha Nguyen, and Thi Lien Nguyen and [sic] the Tribunal was required to do pursuant to Migration Regulation 1.15A(3)(c) (ii).*
29. There are three matters to note about the ground. First, the ground makes two claims. The first, which is made in paragraph (a) of the particulars, is that the Tribunal failed “*lawfully*” to consider the statements of Mr Van Hue Nguyen, the applicant’s father, and Ms Thi Thy Nguyen, Mr Cung’s aunt, to the effect that, from their observations and conversations, the relationship between the applicant and Mr Cung was genuine. The second claim, which is made in paragraph (b) of the particulars, is that the Tribunal failed to consider the opinions expressed in the statements of Ms Thi Thanh Pham, Ms Thi Ha Nguyen, and Ms Thi Lien Nguyen.
30. The second matter to note about the ground is that paragraph (a) of the particulars refers only to two statements, those of Mr Van Hue Nguyen and Ms Thi Thy Nguyen, whereas paragraph (b) of the particulars refers to “*the opinions of the applicant's friends and acquaintances*”. This distinction is made even though the Tribunal itself does not specifically identify statements given by Mr Van Hue Nguyen and Ms Thi Thy Nguyen. It is not entirely clear why the applicant has singled out the statements of Mr Van Hue Nguyen and Ms Thi Thy Nguyen. One possibility is that Mr Van Hue Nguyen and Ms Thi Thy Nguyen have been singled out because they are family members of the applicant and Mr Cung. If that is the basis on which Mr Van Hue Nguyen and Ms Thi Thy Nguyen were included in paragraph (a) of the particulars, there should also have been included in that paragraph the

statements given by other family members, namely, Mr Cung's father (Mr Van Hoc Cung³⁷) and the applicant's sister (Ms Thi Hoi Nguyen³⁸).

31. The third matter to note is that the ground relies on the judgment of Allsop J (as his Honour then was) in *Fang Wang v Minister for Immigration and Multicultural and Indigenous Affairs*.³⁹ Counsel for the applicant submitted it was worth going into *Fang Wang* “*in detail because it's illustrative of a number of the points*” counsel for the applicant wished to make.⁴⁰ That is what I propose to do before I consider the claims made in the ground stated in the amended application.
32. *The judgment in Fang Wang*
33. In *Fang Wang* it was claimed the Migration Review Tribunal (MRT) failed to take into account the question of the fidelity of the applicant to his wife who claimed to be in a “*married relationship*” as prescribed by the Regulations. It was common ground that the question of fidelity of the parties “*was not the subject of express reference or express consideration*” by the MRT.⁴¹ Allsop J found that the MRT did not consider that issue and, for that reason, made a jurisdictional error. The basis of his Honour's conclusion was the contrast between, on the one hand, the MRT having “*in large part attempted to be precise and complete*” and, on the other hand, the MRT's not referring to the material which went to the parties' fidelity to each other.⁴²
34. Allsop J then considered why the MRT did not take into account the evidence of fidelity, noting, however, that an “*explanation as to why it was not taken into account is perhaps unnecessary*”.⁴³ In his Honour's view, the explanation lay in the MRT's having mischaracterised or misunderstood the evidence that was before it.⁴⁴ His Honour arrived at this conclusion by comparing the relevant evidence that was before the MRT with what the MRT said about that evidence. The MRT's findings which Allsop J found mischaracterised or manifested a

³⁷CB96

³⁸CB99

³⁹[2003] FCA 1044

⁴⁰T3.40

⁴¹[2003] FCA 1044, [13]

⁴²[2003] FCA 1044, [17]

⁴³[2003] FCA 1044, [20]

⁴⁴[2003] FCA 1044, [65]

misunderstanding of the evidence was contained in the following passage from the MRT's reasons:⁴⁵

35. Several statutory declarations from family and friends supporting the relationship are before the Tribunal. The Tribunal gives these documents little weight. Most of the statutory declarations only state that the parties are married and that the visa applicant lives with the review applicant's parents, facts which are not in dispute. The statements do not comment on the nature of the spousal relationship between the parties and were written by persons who have not had the opportunity to observe the parties together after 1990.

36. The evidence Allsop J found the Tribunal had mischaracterised or misunderstood included the following:

- a) A statutory declaration from the sister of the husband that she knew personally that the husband loves his wife and his daughter;⁴⁶ that she from 1996 to 2001 she “*intermediated*” phone communications between the husband and the wife approximately every other month.⁴⁷
- b) A letter from the younger brother of the husband who offered the opinion “*they are always a happy couple*”; who stated that the wife lived with the husband's parents; who described the body of communication over the years between him, the husband, the wife, and the husband's parents; and who expressed the opinion that having kept close contact with the husband and the wife he was proud to say the husband and wife have a wonderful relationship.⁴⁸
- c) A joint letter from the husband's parents stating the husband and wife loved each other deeply.⁴⁹
- d) A statutory declaration by a friend of the husband which refers to the husband's communications with the wife and his parents in China, that the husband never had any other female partner or a girlfriend in Australia, and the husband did not change his mind about waiting for

⁴⁵ [2003] FCA 1044, [21]

⁴⁶ [2003] FCA 1044 [25]

⁴⁷ [2003] FCA 1044, [26]

⁴⁸ [2003] FCA 1044, [28]

⁴⁹ [2003] FCA 1044,[30]

his wife and daughter to come to Australia to have their family reunion.⁵⁰

37. After reviewing other items of evidence, Allsop J concluded:⁵¹

38. These errors in reading and characterising these documents are not just errors of fact. There is material in many of these letters which went to (1A)(b), for example the fidelity of the parties and the continuity of their contact. There was also material which went to paragraphs (3)(c)(i) and (ii), in particular (ii). . . .

39. The phrase “little weight” was referred to by the Tribunal. Reading the Tribunal's decision, it is plain in my opinion, that little weight was given to this material, not because of a reading and weighing of it according to its terms as directed to these statutory purposes, but because these documents were (largely incorrectly) seen to be irrelevant for the reasons given. The letters to which I have referred, dealt directly with the very subject matters to which (1A)(b) and (3)(c) were directed, in particular (c)(ii).

40. There is one other matter Allsop J determined. His Honour rejected the submissions that “*friends and acquaintances*” appearing in reg.1.15A(3)(c)(ii) of the Regulations excluded family. His Honour said that in “*ordinary parlance it is not an uncommon usage to call a close relation a friend*”.⁵²

41. *Particular (a) – failure lawfully to consider statements of family members*

42. Counsel for the applicant, in effect, contends the Tribunal made the same error the MRT made in *Fang Wang*. The basis of that contention is the submission that the Tribunal mischaracterised the evidence of Mr Van Hue Nguyen and Ms Thi Thy Nguyen in paragraph 20 of its reasons, which the Tribunal adopted in paragraph 28 of its reasons when assessing the social aspects of the relationship between the applicant and Mr Cung. The applicant submits that it cannot reasonably

⁵⁰ [2003] FCA 1044, [33]

⁵¹ [2003] FCA 1044, [54]- [55]

⁵² [2003] FCA 1044, [57]

be said that the statements of Mr Van Hue Nguyen and Ms Thi Thy Nguyen were in similar terms and that they provided no details. Counsel for the Minister, on the other hand, submits the Tribunal accurately characterised the effect of these statements.

43. In assessing this part of the applicant's claims it is important to be clear about what the Tribunal said and did not say in its reasons. The Tribunal did not say that the "*statements from family members*" were identical or the same. Nor did the Tribunal only say that these statements were "*in similar terms*". The Tribunal said that the statements were "*in similar terms and provide no detail, including whether the writers had observed Mr Cung and [the applicant] together*". The question is whether it was reasonably open to the Tribunal to characterise the statements of Mr Van Hue Nguyen and Ms Thi Thy Nguyen in this way. In my opinion that question is to be answered in the affirmative.
44. The statements of Mr Van Hue Nguyen and Ms Thi Thy Nguyen are reasonably capable of being characterised as following the same pattern – discussions by each of Mr Van Hue Nguyen and Ms Thi Thy Nguyen with the applicant about the applicant's previous marriage; Mr Van Hue Nguyen and Ms Thi Thy Nguyen respectively encouraging the applicant and Mr Cung to develop a relationship with each other; the applicant and Mr Cung displaying to Mr Van Hue Nguyen and Ms Thi Thy Nguyen respectively a reluctance to develop a relationship for fear of entering into another relationship that will fail; Mr Van Hue Nguyen and Ms Thi Thy Nguyen making observations on the happiness of the applicant and Mr Cung respectively; and the absence from the statements of Mr Van Hue Nguyen and Ms Thi Thy Nguyen of any observations of Mr Cung and the applicant being together. As to the last-mentioned aspect of their statements, neither Mr Van Hue Nguyen nor Ms Thi Thy Nguyen mentioned any particular event, or family gathering, in which they said they witnessed the applicant and Mr Cung together as a couple.
45. Counsel for the applicant submitted that in paragraph 6 of her statutory declaration of 12 August 2015, Ms Thi Thy Nguyen said or at least implied she observed the applicant and Mr Cung together. In that paragraph of her statutory declaration, Ms Thi Thy Nguyen refers to

the applicant and Mr Cung having first met at a barbecue held at Ms Thi Thy Nguyen's home in 2009.⁵³ That observation, however, cannot reasonably be taken as being relevant given that the applicant and Mr Cung did not claim they formed a commitment to each other until four years after their first meeting.

46. Given it was reasonably open to the Tribunal to characterise the statements of Mr Van Hue Nguyen and Ms Thi Thy Nguyen as being *"in similar terms and [providing] no detail, including whether the writers had observed Mr Cung and [the applicant] together"*, there can be no basis on that score for inferring the Tribunal failed to take into account matters it was required by reg.1.15A of the Regulations to take into account. In any event, and even if it were not reasonably open to the Tribunal to so characterise the statements of Mr Van Hue Nguyen or of Ms Thi Thy Nguyen, the circumstances of the case before me are distinguishable from those in *Fang Wang*.
47. In *Fang Wang* Allsop J found the MRT did not expressly refer to a matter – the husband's and wife's fidelity to each other – the MRT was required to consider when considering whether there was a *"married relationship"* between the husband and wife; and Allsop J inferred the MRT did not in fact consider that matter. It was this omission that constituted the jurisdictional error his Honour found the MRT committed. The relevance Allsop J attached to the MRT's having misunderstood the evidence before it was that it constituted an explanation for the MRT's failure to consider as relevant the husband's and wife's fidelity to each other.
48. In the case before me, on the other hand, it cannot reasonably be contended the Tribunal did not consider the statements of Mr Van Hue Nguyen and Ms Thi Thy Nguyen by reference to the matters the Tribunal was required to consider to which these statements were relevant or to which they were potentially relevant. The Tribunal considered the statements of Mr Van Hue Nguyen and Ms Thi Thy Nguyen to be evidence relevant or potentially relevant to two matters. One matter was the *"commitment, companionship and or emotional support at the time Mr Cung applied for the visas"*.⁵⁴ That was relevant to the nature of the commitment the applicant and Mr Cung have to

⁵³ CB286, [6]

⁵⁴ CB315, [20]

each other, being a matter the Tribunal was required to consider under reg.1.15A(3)(d) of the Regulations. The second matter of which the Tribunal considered the statements “*from family members*” to be evidence was their “*attesting to a committed relationship between*” the applicant and Mr Cung.⁵⁵ That was a matter relevant to the “*social aspects of the relationship*” between the applicant and Mr Cung, and in particular, the “*opinion of the persons’ friends and acquaintances about the nature of the relationship*” being matters the Tribunal was required to consider under reg.1.15A(3)(c) of the Regulations. In those circumstances, the Tribunal did not give the “*statements from family members*” great weight, not because it considered them to be irrelevant, but “*because of a reading and weighing of [them] according to [their] terms as directed to [the] statutory purposes*” specified in reg.1.15A(3) (c) and (d) of the Regulations.⁵⁶

49. This part of ground 1, therefore, fails.

50. *Particular (b) – failure to consider opinions of friends and acquaintances*

51. The applicant submits the Tribunal did not consider the opinions given by the friends of the applicant and Mr Cung. The basis of that submission is the Tribunal’s stating it has “*considered statements from family members*”. Counsel for the Minister submits that this is a construction attuned to finding error in the Tribunal’s reasons and that the Tribunal intended this expression to cover all of the statements before it, including statements from friends who are not family members of Mr Cung or the applicant. The resolution of the competing submissions turns on the construction of the expression “*statements from family members*” in the contexts in which the Tribunal used that expression.

52. There are a number of matters to note.

a) First, the Tribunal did not describe by name any of the “*family members . . . attesting to a level of affection and commitment between Mr Cung*”⁵⁷ and the applicant or “*family members*

⁵⁵ CB316, [28]

⁵⁶ *Fang Wang v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1044, [55]

⁵⁷ CB315, [20]

attesting to a committed relationship” between the applicant and Mr Cung.⁵⁸ Had the Tribunal in truth only intended to refer to two (or four, if the statement from Mr Cung’s father and the statement from the applicant’s sister are included) of the total number of statements that were before it because they were statements given by “*family members*”, it is reasonable to expect the Tribunal would have identified those people by name, rather than by the general expression “*family members*”. That the Tribunal did not identify by name the persons whom it intended to denote by the expression “*family members*” suggests the Tribunal used that expression to denote all of the persons who had given statements attesting to the relationship between the applicant and Mr Cung.

- b) Second, the Tribunal used the expression “*family members attesting*” in two sections of its reasons. One is in the section headed “*Nature of persons [sic] commitment to each other*”. That section was intended to deal with the matters specified by reg.1.15A(3)(d) of the Regulations. The other section is headed “*Social aspects of the relationship*”, in which I infer the Tribunal intended to deal with the matters specified in reg.1.15A(3)(c) of the Regulations. That includes the matter specified in paragraph (c)(ii), namely, “*the opinion of the persons’ friends and acquaintances about the nature of the relationship*”. In these circumstances it seems unlikely that, when considering whether there was evidence of opinions of the applicant’s and Mr Cung’s “*friends and acquaintances about the nature of the relationship*” the Tribunal would have singled out and considered only the opinions that had been given of the members of the families of the applicant or Mr Cung from all of the statements that were before it. It is more likely that the Tribunal considered all of the opinions that were before it.
- c) Third, in paragraph 28 of its reasons, after referring to its not giving great weight to “*statements from family members attesting to a committed relationship between*” the applicant and Mr Cung, the Tribunal noted “*it has **no other evidence** that friends and acquaintances think of [the applicant] and Mr Cung*

⁵⁸ CB316, [28]

as a married couple” (emphasis added). This suggests the Tribunal used the expression “*family members*” to which it had earlier referred in the paragraph interchangeably with the expression “*friends and acquaintances*”. That, in turn, suggests the Tribunal used the expression “*statements from family members*” to refer to statements given not only by members of the families of the applicant and Mr Cung but also by their friends and acquaintances.

- d) Fourth, the Tribunal’s characterisation of “*statements from family members . . . attesting to a level of affection and commitment between Mr Cung*” and the applicant as being “*similar in terms and [providing] no detail, including whether the writers had observed Mr Cung and [the applicant] together*” is reasonably capable of applying to all of the statements the applicant submitted to the Tribunal. That suggests that the Tribunal used “*statements from family members*” to refer to all of the statements on which the applicant relied.

53. Having regard to these matters, I am not satisfied that the Tribunal only considered the opinions given by members of the families of the applicant or Mr Cung about the nature of the relationship between the applicant and Ms Cung. This part of ground 1, therefore, also fails.

54. Disposition

55. I propose to order that the application be dismissed.

I certify that the preceding forty (40) paragraphs are a true copy of the reasons for judgment of Judge Manousaridis

Date: 20 December 2017